

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-6113

To be argued by
ROBERT M. GINSBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAROL LAVENDER, as Administratrix of the Goods,
Chattels and Credits of RONALD LAVENDER, deceased,
JOHN M. LUGER, as Administrator of the Goods,
Chattels and Credits of JOHN W. LUGER, deceased,

Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court for
the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS

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CAROL LAVENDER, as Administratrix of the Goods,
Chattels and Credits of Ronald Lavender,
deceased, JOHN M. LUGER, as Administrator
of the Goods, Chattels and Credits of
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BRIEF FOR PLAINTIFFS - APPELLANTS

PRELIMINARY STATEMENT

In this action to recover for wrongful death and conscious pain and suffering plaintiff, Carol Lavender, as Administratrix, and John M. Luger, as Administrator, appeal from a judgment of the United States District Court, Southern District of New York (Owen, J.), entered June 15, 1977, in favor of the plaintiff Luger and against the defendant in the sum of \$17,063.30 and in favor of the plaintiff Lavender and against the defendant in the sum of \$369,346.92.

The trial court itemized the award as follows:

In the Luger case:

- 1) \$15,000 for loss of economic support and of services combined.
- 2) \$2,063.34 for funeral expenses.

In the Lavender case:

- 1) \$24,225 for loss of earnings up to trial.
- 2) \$258,673 for loss of future support as discounted to present value.
- 3) \$15,000 of loss of support to be segregated for daughter for expenses of higher education.
- 4) \$15,077 for loss of parental care and guidance.
- 5) \$15,000 for conscious pain and suffering.
- 6) \$6,150.92 for funeral and medical expenses..

- 7) \$52,050 for loss of pension rights as discounted to present value.
- 8) \$13,165 for loss of past and future medical and hospitalization insurance.

In the Luger case, the Court awarded exactly what the Government suggested; commenting that even this amount (\$15,000 for the death of a 20-year-old wage earner) was more than it would have awarded had not the Government suggested the \$15,000 award. Plaintiff's economist had projected an economic loss of 10 times this amount, i.e. \$150,000.

In the Lavender case, the Court awarded about one-third of what plaintiff had requested and approximately the Government's figure. Although the \$369,346.92 total award is not small in absolute terms, it is woefully inadequate in terms of the evidence presented in this case, where plaintiff's expert had projected economic losses alone of \$935,000.

We believe the explanation for the grossly inadequate amounts lies in the Court's misapplication of applicable law, or in its disregarding of segments of the evidence favorable to plaintiffs.

The chart which follows attempts to outline the main areas where we contend these errors occurred and their result.

<u>ITEM</u>	<u>COURT AWARD</u>	<u>APPROPRIATE AWARD</u>	<u>REASONS ADVANCED FOR INADEQUACY</u>
<u>LAVENDER</u>			
Job related losses	\$348,113	\$845,709	1. Incorrect Discounting 2. Improper deduction of income taxes
Future Promotions	\$ 0		1. Disregarding of overlooking of the evidence
Loss of Consortium	\$ 0	\$87,000	1. Misinterpretation of New York law
Loss of Services	\$ 0	\$89,279	1. Improper adoption and application of "Net Consumer" theory
<u>LUGER</u>			
Loss of Future Support and Services	\$15,000	\$150,000	1. Ignored or overlooked New York precedents 2. Improperly evaluated possibilities of future marriage
Conscious Pain and Suffering	\$ 0	\$ 10,000	1. Ignored or overlooked evidence

INTRODUCTION

At approximately 3:00 A.M. on October 31, 1974, John Luger, 20 years of age, and Ronald Lavender, 27 years old, were working as members of a Con Edison emergency crew near a manhole in a New York City street. They were killed when a negligently operated United States Postal Service truck ran into them.

The United States of America conceded liability and a trial was held on damages only in January of 1977. Judgment was entered in June of 1977.

Rather than burden the Court with a recitation of the specific evidence presented below, we will include a summary of the pertinent facts as part of our discussion of the issues raised on this appeal.

We believe the awards in the Luger and Lavender cases were erroneous and inadequate.

Our arguments may be summarized as follows:

- 1) The Court erroneously concluded there was insufficient evidence of Luger's conscious pain and suffering.
- 2) The Court improperly ruled that a State Appellate Division holding on a question of damages was not controlling in this Tort Claims Action.
- 3) The Court incorrectly concluded Luger would in the near future marry and not continue to support his parents or render them services.

- 4) The Court incorrectly reduced projected income by over 30% to account for possible income taxes paid by the decedent Lavender during his projected work-life expectancy.
- 5) The Court applied the incorrect discount rate in determining the value of projected earnings.
- 6) The Court improperly ruled decedent Lavender was a "net consumer" of household services.
- 7) The Court failed to take into account the probability Lavender would be promoted to foreman.

For these reasons, we believe the awards in the Luger and Lavender cases should be substantially increased.

POINT I

The Trial Court Improperly Concluded
There Was Insufficient Evidence to
Sustain an Award For Luger's Conscious
Pain and Suffering.

In view of the evidence presented in this case, the Trial Court was incorrect when it declined to make an award for Luger's conscious pain and suffering. The following facts relevant on the issue were established at trial.

Luger was killed as a result of his being crushed between two trucks which had collided (15a, 23a).

Anthony Church, one of Luger's co-workers present at the scene, testified concerning his observations following the accident:

- Q Can you tell us where Mr. Luger was?
A I seen Luger on the right-hand side in the back of my truck, between my truck and the mail truck.
Q And the mail truck and your truck, how close together were they?
A They were making contact.
Q Was Mr. Luger in-between the two trucks?
A Yes, he was.
Q In what position was he? By that I mean, was he lying down or was he in a vertical position or crouched over?
A He was in an upright, standing position.
Q Did you observe Mr. Luger's condition?
A Yes, I did.
Q How would you describe that?
A Well, Luger, he had a habit of putting a straw in his mouth at the end of every coffee break that we had. Like after we have a coffee break you get a little stirrer to stir the coffee up

and after that he would put it in his mouth for the remainder of the night.

When I approached him, the little straw was going around and around in his mouth and I called out to him and when I did that his jaw started to move a little faster.

Q Did you notice whether his eyes were open or closed?

A His eyes were open.

Q Aside from moving a straw as you indicated, a stirrer I guess is a better word, aside from moving that, was he moving any other part of his body?

A At one particular point all I saw was his eyes. It like gazed over to where we were standing because we couldn't get right in front of him because of the truck (14a-16a).

Church recalled that Luger was placed in the ambulance about one-half hour after the occurrence of the collision (29a).

Sebastian Sperra, who rode to the hospital in the ambulance with Luger, testified that during the ride he heard a "slight noise coming out of his [Luger's] mouth" (37a).

Sperra went on to aver:

A He was moaning and I also noticed that when the ambulance made a left turn, his foot would go off the stretcher and it looked like the bones were completely broke and was held by the skin. I saw the attendants pick up his foot and put it back on the stretcher. It also happended when the ambulance made another turn, the other way, his right foot would go off the same way. It looked like both bones were broken completely (37a).

Michael Cseh, the police officer responding to the scene who helped place Luger onto a stretcher, recalled the observations he had made:

A I observed that he [Luger] was injured very severely.

Q Did you hear anything coming from this person?

A I heard moans and groans.

Q When you say that you observed he was injured severely, could you describe what about his body you noticed?

A As far as I can recall, his head was cut open and I believe his legs were severed, partially and more cuts. (197a).

On the basis of these facts, it is clear that the Court's conclusion the evidence was insufficient to support a finding of conscious pain and suffering, was erroneous.

Under New York State Law, evidence of "moaning and groaning" is alone sufficient to sustain an award for conscious pain and suffering [see Parker v. McConnell Manufacturing Co., Inc., 40 A.D. 2d 387 (4th Dept. 1972); Kinner v. Kuroczka, 12 A.D. 2d 383 (3rd Dept. 1961); see also, Ramos v. City of New York, 56 A.D. 2d 763 (1st Dept. 1977)].

Here, there was testimony showing that Luger was not only "moaning and groaning" at the scene of the accident but continued to make sounds even after being placed into the ambulance.

That decedent suffered prior to his death as a result of the defendant's negligence is also inferable from this record which reveals he consciously experienced a harrowing ordeal.

It is well settled that "certain injuries are almost invariably associated with pain and suffering, in which event the presence of pain may properly be inferred from the injury itself, with little or no direct evidence in support thereof unless there is affirmative evidence of facts and circumstances ruling out such pain and suffering" [Dowley v. State, 190 Misc. 16 (Ct. of Claims 1947)]; see also Warren's Negligence, Death Actions, §5.05 Pain and Suffering).

Here, decedent was crushed between two trucks. He was trapped standing upright between the vehicles until police and others could pry the trucks apart, at which point he fell to the ground. His legs were badly "severed" and bleeding. According to the autopsy report in evidence (Plaintiff's Exh. 9) decedent sustained multiple fractures, including of the skull, of both lower extremities and of one arm. It would be reasonable to conclude under these circumstances that Luger's pain, suffering and fear of death was substantial.

Evidence that decedent's jaw was moving, that his eyes were open, that a straw in his mouth was going "around and around" and that he reacted when called to (15a), combined

with proof of noises coming from his mouth (37a), provided both substantiation and corroboration of the conscious pain and suffering claim (cf. Parker v. McConnell Manufacturing Co., Inc. 40 A.D. 2d 587 (4th Dept. 1972); see also Ramos v. City of New York, supra).

In light of the fact that defendant offered no affirmative proof which would rule out the probability of suffering on decedent's part,* it is evident that the Trial Court was incorrect in refusing an award for conscious pain and suffering.

*The mere fact decedent did not talk or respond to questions did not preclude a finding of conscious pain and suffering (cf. Tenczar v. Milligan, 47 A.D. 2d 773 (3d Dept. 1975)).

POINT II

The Trial Court Improperly Denied an Award for Loss of Consortium In the Lavender Case.

It is beyond cavil that questions concerning the measure of damages are, in actions under the Federal Tort Claims Act, governed by the law of the State in which the injury giving rise to the action was sustained [28 U.S.C. §2674; see e.g. Hatahley v. United States, 351 U.S. 173 (1956), see Landon v. United States 197 F. 2d 128 (2d Cir. 1952); see generally Annotation, 1L. Ed 2d 1647, §13].

It is also an axiom of federal jurisprudence that 1) where State law supplies the rule of decision, it is the duty of the federal court to ascertain and apply that law even though it has not been propounded by the highest state court, and that 2) since a lower state court is an organ of the state, its determination in the absence of more convincing proof of what the state law is, should be followed by a federal court in deciding a question governed by state law [West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940); Six Companies of California v. Joint Highway Dist. No. 13, etc., 311 U.S. 180 (1940); Storer v. New York Life Ins. Co., 311 U.S. 464 (1940); Fidelity Union Trust Co. v. Field 311 U.S. 169 (1940); see

also Robles v. Folsom, 239 F. 2d 562, 564 (2d Cir. 1956) cert. denied, 353 U.S. 960 (1957); Mayer v. Chase National Bank, 233 F. 2d 468, 470 (2d Cir.) cert. denied, 352 U.S. 841 (1956); Hausman v. Buckley, 299 F. 2d 696 (2d Cir. 1962); cf. Beggs v. Dougherty Overseas, Inc. 287 F. 2d 80 Cir. 1961) Moore's Federal Practice ¶0.307 et seq.]

As the United States Supreme Court made clear in West v. American Telephone & Telegraph Co., supra:

"A state is not without law save as the highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state, although the highest court of the state has never passed upon them. In these circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule. . . ." 311 U.S. at 236-7.

Here, the Court below ruled that the law of New York, as expressed by the majority of the Appellate Division, Second Department, in Martins v. Ford, ____ AD 2d ____ 389 N.Y.S.

2d 620 (2d Dept. 1976), was not controlling. Instead, the trial judge adopted the dissent in the Martins case as the law to be applied herein, claiming the Court of Appeals of New York has not spoken to the contrary on the subject. It therefore ruled loss of consortium is not a proper element of damage in a wrongful death case. We believe the Court's decision in this regard was erroneous.

The holding in Martins v. Ford, supra, that loss of consortium is recoverable in a death action, is the law of New York, not the dissent. Furthermore, we respectfully point out that the Court of Appeals has in effect spoken "to the contrary" in Millington v. Southeastern Elevator Co., 22 NY 2d 498 (1968), the case cited as supportive authority by the Martins Court.

Millington establishes that a loss of consortium constitutes damage of a "pecuniary" nature. As the Court in Millington stated:

"It is also contended that the "sentimental" damages such as the diminution of the value of her husband's society and affection and the deprivation of sexual relations and the attendant loss of child-bearing opportunity are too personal, intangible, and conjectural to be measured in pecuniary terms by a jury. This argument has no merit. The logic of it would also hold a jury incompetent to award damages for pain and suffering.

Money is a poor substitute for the loss of an only child or the pain resulting from serious injuries. Likewise, it cannot truly compensate a wife for the destruction of her marriage, but it is the only known means to compensate for the loss suffered and to symbolize society's recognition that a culpable wrong-even if unintentional-has been done." (Emphasis supplied)

We submit that the loss of consortium may be compared with the loss of parental care and guidance upon the death of a parent. In Tilley v. The Hudson River R.R. Co., 24 NY 471, 476 (1862), the Court made the following statement with respect to such a cause of action belonging to a child:

"The injury in these cases is not pecuniary in a very strict sense of the word, but it belongs to that class of wrongs as distinguished from injury to the feelings and sentiments; and in my view, therefore, it falls within the terms of the statute [the predecessor to the present wrongful death legislation]."

And, as a practical matter, would not Mrs. Lavender be required to expend sums of money to replace the companionship and society which had been provided by her husband? Are not professional escorts, memberships in clubs and organizations, and singles weekends in search of companionship, costly? We submit that loss of society, love and companionship is compensable under New York's wrongful death statute. [EPTL §5-4.3] (see Annotation, 36 ALR 3d 900 for numerous cases holding that loss of consortium is recoverable).

We refer this Court to the recent holding in Alexander v. The City of New York, 53 A.D. 2d 846, 385 NYS 2d 788 (1st Dept. 1976) wherein the Appellate Division, First Department, awarded a husband \$250,000 for the death of his non-working wife. It may be concluded that a large portion of that verdict was attributable to loss of consortium.

POINT III

The Court's Award For Wrongful Death in the Luger Case was Inadequate.

a) The Evidence Concerning John Luger

John Luger was 20 years old when he died (43a). In February of 1973, after graduating from high school, he became employed by the Con Edison Company, as a "B" mechanic (11a, 44a). He was a "good worker" (34a) who was eager to learn (12a).

In 1973 he had earned \$6,383.20 in base pay and \$2,897.81 in overtime, for a total of \$9,367.23 (116a).

Luger lived at home with his mother, father and five younger brothers and sisters (45a).

John M. Luger and Gertrude Luger, decedent's father and mother respectively, testified at trial as follows:

Decedent contributed about \$30 per week to his family on a regular basis (48a). He also contributed towards the payments and insurance on the family car which he used on occasion but which was registered in his father's name (49a).

Because he worked night shifts and weekends, decedent ate less than 3 meals at home (47a). Mrs. Luger testified there was not much of a difference in her food budget following her son's death (80a).

Decedent helped his father do major maintenance jobs around the house. He frequently cut the lawn and drove the family to various places (55a, 56a). He also helped his mother "when she needed him." "He was always available, helpful that way" (81a, 82a). In fact, he drove his mother to the supermarket two or three times weekly (81a). Although his mother and sisters shared the cooking and laundry responsibilities of the household (69a, 70, 78a), decedent straightened his own room and purchased his own clothing (70a -71a).

Decedent's father was 47 years of age and worked as a teacher of auto mechanics, earning approximately \$20,000 per annum (42a-43a). He had approximately \$1,000 in savings prior to his son's death (62a). His daughter was attending college (51a).

Concerning his son's disposition to provide financial assistance in the future, he testified: "I think if something happened to myself or I did get sick, that I could go to him and expect some help from him ..." (68a). He went on to add that he expected his son to contribute some percentage of his income

to the household as years went by, even after getting married (73a). Decedent, however, was not involved in any serious way with a girl at the time of his death (56a).

Decedent, he added, was happy with his job at Con Edison and had planned to continue to work for that company (51a).

Luger's life expectancy was 50.1 years and his work-life expectancy was 39.7 years (161a-163a). His father's life expectancy was 27.8 years; his mother's, 32.4 years (167a, 168a).

Based on this information, plaintiff's economic expert testified that a figure of 39.7 years for Luger's work-life expectancy was conservative, given the fact that after 10 years service, one's job is "safe" under Con Edison's collective bargaining agreements (90a, 163a).

Luger's projected earnings, based on an historical analysis of collective agreements as they pertain to class "B" mechanics (which revealed an annual 7.1% over-all increase in salaries) discounted to present value, was \$597,161, not considering overtime (173a). Assuming decedent would continue, as he had in the past, to earn an average of 34% of base pay in overtime, his earnings were projected to be \$800,196, over his work-life (173a, 174a). If one were to project that

decedent would continue to contribute to his parents 14% of his earnings on the average (taking into account increases in salaries and increases in his parents needs in future years), over his mother's life-expectancy, decedent's total contributions to his family would be over \$112,000 (167a, 174a). And on the basis of the minimum wage (an average of \$2.30 per hour), 10 hours a week, 52 weeks out of the year, one could reasonably estimate the value of decedent's maintenance service at more than \$1,100 per year (see 175a). Over the remainder of decedent's mother's life expectancy, this loss amounts to over \$35,000.

- b) The Court Incorrectly Concluded Decedent Would Marry In the Near Future and Not Continue to Contribute Support to his Parents or Render Them Services.

We respectfully except to the Court's conclusion that the "greater possibility" was that Luger would marry within the next several years and thereafter need all of his income for his family. And we most respectfully submit that the Court's determinations that Luger's parents would have no need for support in the future and that if need there be, the other unmarried children would provide it, are clearly erroneous.

It is an ancient maxim of law regarding the probability of future services rendered and support provided by a child to his parents, that these damages are:

"of necessity, to a great extent speculative or conjectural. There are many contingencies which may deprive the parent of the services [as well as of the support] of a child, and even make the child a pecuniary burden to the parent...the child may die from disease or other accident, or the parent may die. The prospective damages for loss of service [and for loss of support] recoverable in such a case as this, may never in fact be sustained. But as only one action can be maintained against a wrong doer for a single wrong, the law, from necessity, permits consequences not yet fully ascertained, but which are reasonably certain to happen to be anticipated..." [Cuming v. Brooklyn City Railroad Company, 109 N.Y. 94 (1888)]. (Emphasis supplied).

All of the proof in this case pointed to the likelihood that Luger would continue to remain at home in the coming years and, even after moving away, continue to contribute towards the support of his mother and father. This probability of future support is corroborated by the fact that decedent was not involved with a female prior to his death, was happy with his job, had demonstrated no inclination to move out of the household despite his age and financial independence, and was the eldest of the children.

He, as the oldest child, would thus be the first in the near future to be called upon to meet any financial burdens with which the family might be faced. He, as the oldest child, might be expected to bear a large portion of the financial burden of caring for his parents in their old age.

Luger's father had only \$1,000 in savings prior to October 1974. With the assistance of the decedent he was able to meet the expenses of running the household. It would be reasonable to infer that with one child in college, and the others approaching college age, that Mr. Luger would require additional financial assistance in the coming years. Mr. Luger's testimony indicated decedent would probably have provided that assistance.

We do not dispute the propriety of the Court's consideration of the probabilities of marriage in decedent Luger's instance [see Livaccari v. Zafonte, 48 A.D. 2d 20 (2d Dept.) appeal withdrawn, 37 NY 2d 807 (1975)]. And absent evidence to the contrary, the Court's assessment of the "possibilities" would probably be unimpeachable. However, the evidence presented in this case weighed in favor of a finding that decedent would not marry "within the next several years." Plaintiff should have

been given the benefit of all reasonable inferences in this regard.

What is more, the value of decedent's services was clearly underestimated. Recently, in Florence v. Goldberg, 395 N.Y.S. 2d 57 (2d Dept. 1977), the Appellate Division sustained an award of \$125,000 for loss of services of an infant for approximately 14 years (from age 6-1/2 to age 21). This amounts to approximately \$9,000 per year for loss of services alone. The award in Luger is inadequate by comparison. There was uncontroverted evidence in the Luger case of services performed by the deceased.

Awards sustained in other cases involving the death of an infant demonstrate the inadequacy of the total amount awarded herein.

In Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18 (Fla. App. 1971), \$1,800,000 was awarded for the death of a 15-year-old boy who intended to enter high school.

In Hart v. Forchelli, 445 F. 2d 1018 (2nd Cir.), cert. denied, 404 U.S. 940 (1971), \$252,000 was awarded for the death of an 18-year-old college student who had tentative future plans. He was an outstanding athlete and was survived by his mother only. He had expressed some intention to support

his mother when he finished his education. Compared with the Hart award, is not the verdict in this case clearly erroneous?

Recently, in LaForest v. Autoridad de Las Fuentes Fluviales de Puerto Rico, 536 F.2d 443 (1st Cir. 1976) the Court upheld a jury verdict of \$210,000 (\$75,000 to each parent and the remainder to siblings) for the death of an 11-year-old, said to be an intelligent, affectionate and well-motivated child who had strong family ties and who, had he followed the lead of his brothers and sisters, may have gone on to college and a successful career [at p. 446).

In W.L. Harper Co. v. Slusher, 469 S.W. 2d 955 (Ky. 1971), \$150,000 was awarded for the death of a 20-year-old high school graduate who worked for the Department of Highways and earned \$3,600 per year. And in Adams v. Hunter, 343 F. Supp. 1284 (D.C.S.C.) aff'd, 471 F. 2d 648 (4th Cir. 1973), \$125,000 was sustained for a 19-year-old's death. He was survived by a father, mother, brother and two sisters, was a good student and was preparing to enroll in college. Clearly, is not the award in the case at bar inappropriate by comparison?

In addition, in Kupitz v. Elliott, 42 A.D. 2d 898 (1st Dept.) leave denied, 33 N.Y. 2d 519 (1973), the First Department sustained an award of \$150,000 for the death of a 21 year old child. The award in our case, we respectfully submit, is erroneously inadequate by comparison. Was the life of the Luger boy as worthless as the award indicated?

POINT IV

The Court's Award For Wrongful Death In The Lavender Case Was Inadequate

a) The Evidence Concerning Ronald Lavender

Ronald Lavender was 27 years of age at the time of his death. He had been married to Carol Lavender for 4 years and had known her for 2 years before that. They had had one child, Debra Ann, born on August 30, 1972 (131a-134a).

Lavender started working for the Con Edison Company in 1960 (136a). He was a grade "A" mechanic when he died (32a).

He was considered a "hard worker" (9a-10a), who had improved in his work "very much" over the years. His foreman was satisfied with his job performance (34a).

In 1973, his base pay was \$9,190.40; his overtime was \$2,366.80, for a total of \$11,557.20. His base pay in 1974 (up to October) was \$9,506.40. With overtime salary of \$2,807.89, his earnings that year were \$12,314.29 (116a).

It was established that Con Edison workers receive both general across-the-board salary increases and promotional increases within "title." Promotional increases within the title of "A" mechanic (\$6 per week) were given three times a year (91a-92a). Overtime pay is at a rate of time-and-one half (96a). Work on the 4 to 12 P.M. shift is remunerated by

a 6% premium; work on the 12:00 to 8:00 A.M. shift commands an 8% premium and work on Sundays results in a 50% premium (96a).

Each employee receives welfare benefits (health, dental, hospital and pension plans) from the company which amount in value to approximately 26% of straight-time pay (179a, 194a). Specifically, there is a hospital and medical plan which accrues to the benefit of the employee, his spouse and his dependents to age 19 (185a, 120a-121a, 97a, 101a). The major medical and dental plans are for the benefit of his dependents, as is the company drug prescription program (185a). Also available is a blood bank program and group life insurance (180a, 186a, 192a). Vacation pay was valued at an additional 5.9% of straight-time salary (191a).

It was proven that some 50 to 60% of all "A" mechanics were promoted to foreman (32a, see also 94a). A foreman earns 30% more than an "A" mechanic (32a). The company policy on promotions was contained in the collective bargaining agreement. The factors considered in promoting a worker were:

- 1) length of continuous service; 2) knowledge, training, ability, skill and efficiency; 3) physical fitness and 4) attendance record (128a-129a).

Lavender supported his wife and child with his earnings. The family lived in an apartment house. His salary paid the rent, gas, electricity, clothing and other bills. The Lavenders had no checking account. Decedent would give his wife his pay. She in turn would give him \$5.00 a day to travel to work (by bus and train) and for lunches (134a, 139a-141a).

Decedent accompanied his wife on shopping trips and carried the bundles of groceries. He also did maintenance work around the house and drove his wife to visit her parents (142a-143a).

Working a 5 1/2 day week, then 7 days nights and 7 days evenings, decedent relaxed when he returned home from work (136a). On occasion, he took his wife to the movies, out to eat, to his parents' house, or visited with neighbors (135a, 138a). He also went fishing from time to time (138a).

Lavender's life-expectancy was 43.5 years. His work-life-expectancy was 34.3 years (201a-202).

Taking into consideration the facts and circumstances presented, Professor Berenson projected decedent's future earnings. The "flat projection" (without considering the 7.1% per annum increase in salaries, overtime or fringe benefits) of the total loss would be \$587,777 (203a). The fringe benefits

accruing to decedent's dependents were calculated to be \$152,822 (207a). Using the average consumption for a wage earner in a family similar to that of decedent (25.8%), decedent would consume \$151,647 (210a). The "flat projection" plus fringe benefits, minus personal consumption was \$588,952 (211a). Taking into account the 7.1% per year increase and the 6.2% discount, the sum was \$668,670. Adding to this amount the discounted value of fringe benefits, and overtime, the loss was computed to be \$845,709 (224a, 225a).

The discounted value of decedent's household services was \$89,279 (229a). This figure was arrived at by discounting a flat projection of \$94,168, using a salary expansion factor of 5.1%, the average annual increase in salaries for painters and carpenters (230a).

Professor Berenson's figures, it should be noted, were exclusive of loss of consortium and parental care and guidance (230a) and did not make allowances for promotions (226a), part-time employment during the 9.2 years between decedent's life and work-life expectancies (227) or for loss of social security benefits (227).

In all areas, moreover, Professor Berenson was quite

conservative. The overtime figure assumed that Mr. Lavender at the age of 27, with only one child to support, would not attempt to increase his overtime as the years went on. It is probably a fact of life, however, that seniority and larger families cause a person to seek more overtime and thus the early figures tend to be conservative low.

Similarly, in fringe benefits, historically unions have been adding fringe benefits as contracts progressed. No allowance was made for the likelihood that the collective bargainers would probably provide additional fringe benefits for Con Ed workers in the future as they have historically done in the past.

Finally, Professor Berenson's provision for personal consumption was generously high. Items such as rent, utilities, automobile expenses, etc. do not in reality decrease in a significant way upon the death of the breadwinner. Thus, while a percentage of these items may be considered in personal consumption, they in reality do not result in any significant savings to the family upon the death of the husband-father. Similarly, one might suggest that future children in the Lavender family would be likely and would mean a lesser percentage for his own personal consumption.

Rather than detract from Berenson's conclusions, testimony by the defendant's expert served to support them.

Fitzgerald estimated that decedent's total income to age 63, unadjusted and undiscounted, would be \$2,295,938 (343a). Using a discount rate of 5%, he determined that the present value of this sum was \$855,000 (304a, 355a). He admitted, however, that if inflation were eliminated there would still be a 3% productivity increase and a 2% discount rate, leaving a net discount rate of 1% increase per annum (see 387a, 388a).

His estimate of \$287,029.14 as the ultimate loss in this case (284a) was shown to be erroneous in several respects:

1. The witness reduced earnings using a survival probability percentage (302a). The life-and work-life expectancy tables, however, already take into account the probability of survival.
2. He was unaware of decedent's salary level within the "A" mechanic's title (333a). He thus did not include in his computation the progression increases from November 4, 1974 to March 2, 1975 (336a). This constituted an additional \$19,000 in losses (343a).

3. He deducted some 38% of gross income for taxes (362a); clearly an unreasonable percentage given decedent's income tax bracket.
 4. He assumed decedent would have no earnings after age 63 (359a-360a).
 5. He did not take into account fringe benefits (321a).
 6. The witness estimated that decedent's personal consumption would be 40% of the total consumption (370a).
- b) The Court improperly deducted projected income taxes from the award used an incorrect discount rate in adjusting for present value.

The trial court, we respectfully submit, committed two basic errors with respect to its computations. First, it deducted projected income taxes from the award when it ought not. Second, the court employed an improper discount rate in adjusting the award to present value.

The court's award for loss of earnings was based on a projected income of \$11,000. Decedent's gross earnings at the time of his death were shown to have been over \$16,000 per year. The court therefore deducted over 30% of gross earnings for the amount of taxes it predicted decedent would have paid on his projected income. We contend that 1) income taxes should

not have been considered in this case, and 2) even assuming that taxes were properly considered, the percentage of gross earnings held to be attributable to taxes in this case, was erroneous.

The majority of jurisdictions in the nation, including the Second Circuit, have held that as a general rule, income tax consequences are not properly considered in a wrongful death case when fixing damages for loss of future earnings [see e.g. Haddell v. Levin, 395 F.Supp. 64, 85-86 (DC N.J. 1975) which provides an extensive list of holdings].

The federal courts have been persistently reluctant to permit evidence of future taxes because of the demonstrated unpredictability of both the tax laws and personal deductions and exemptions. Evidence of taxes is inherently speculative conjectural and overly complex to be of probative value [Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); see also, In re Marina Mercante Nicaraguense S.A., 364 F.2d 118 (2d Cir. 1966), cert. denied, 385 U.S. 1005, cert. denied 386 U.S. 929 (1967); McWeeny v. New York, N.H. & H.R.R. Co., 382 F.2d 34 (2d Cir.) cert. denied, 364 U.S. 870 (1960), Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308 (2d Cir. 1964) (See Moore, Circuit Judge dissenting); Montellier v. United States, 315 F.2d 180 (2d Cir. 1963); Chicago & Northwestern Ry. Co. v. Curl, 178 F.2d 497 (8th Cir. 1949); Southern Pacific Co. v. Guthrie, 185 F.2d 926 (9th Cir.), cert. denied, 341 U.S. 904 (1951);

Wetherbee v. Elgin, Joliet & Easter Ry.Co., 191 F.2d 302 (9th Cir. 1951); 63 A.L.R. 2d 1393, 1393 et seq.; 63 A.L.R. 2d 1393-1425 (Later Case Service)].

The exception to this general rule of exclusion was espoused in McWeeny v. New York, HH. & H.R.R. Co., supra. *

There, this Court indicated that in situations where close to one-half of the deceased's projected income would go to taxes, the court could consider taxes. The McWeeny court made clear that such cases, however, are in sharp contrast with the great mass of litigation at the lower and middle reaches of the income scale, where future income is fairly predictable and added exemptions and deductions can drastically affect the tax liability [McWeeny, supra at 35]. In these cases consideration of taxes is appropriate.

The term "middle reaches" of the income scale has been construed in several cases.

In Montellier v. United States, 315 F.2d 180, 186 (2d Cir. 1963) earnings were \$11,150 per year. In Petition of Marina Mercante Nicaraguense, S.A., 364 F.2d 118 (2d Cir. 1966) cert. denied, 385 U.S. 1005 (1967) earnings were \$11,500. In

* It should be noted that the McWeeny rule is followed in a number of other jurisdictions [see Burlington Northern, Inc. v. Boxberger, 529 F.2d 284, 291 (9th Cir. 1975) for numerous citations].

United States v. Becker, 378 F.2d 319 (9th Cir. 1967) lost income was approximately \$15,000 per annum. In none of these cases were taxes considered in arriving at a measure of damages.

Taking into account the years of inflation since the decisions in Montellier, Mercante and Becker, it is clear that the \$16,000 income in this case falls in the middle reaches of the scale within the meaning and intent of McWeeny. What is more, decedent and his wife were 27 at the time of decedent's death. It would be reasonable to infer from this record that had he lived, decedent would have had additional children, perhaps purchase a home and develop tax shelters in the next several years of his life, thus, drastically changing his tax status and liability. Projecting an increase in his tax liability on the basis of his life circumstances prior to death was speculative and inequitable.

And even assuming arguendo that the court was correct in deducting taxes, and by this we do not concede or suggest that the court was, in fact, correct in this regard, the percentage of gross income attributed to taxes herein was unreasonable. The court concluded that at decedent's income level, his tax liability would be over 30% of gross income.

Suffice it to say, an examination of the tax tables over the last several years reveals that an income of \$16,000 falls within a significantly lower tax bracket than 30% per annum.

Second, the court employed a discount rate of 2% per annum. This was incorrect. While, we believe, the court properly took the factor of inflation into account in arriving at the discount rate [see Feldman v. Allegheny Airlines, Inc., 524 F.2d 384 (2d Cir. 1975); see also, e.g., Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977); United States v. English, 521 F.2d 63 (9th Cir. 1975); Seaboard Coast Line Railroad Co. v. Garrison, 336 So.2d 423 (Fla. App. 1976), and see, Neddo v. State, 194 Misc. 379 (Ct. of Claims 1948) aff'd. 275 App. Div. 492 (3d Dept.), aff'd. 300 N.Y. 533 (1948); Lucivero v. Long Island Railroad Co., 22 Misc. 2d 674 (Sup. Ct. 1960) see generally 12 ALR 2d 611] the conclusion that 2% was the proper value to be used to determine the present value of future income was inaccurate.

In determining the discounted value of decedent's projected earnings, plaintiff's economist, Professor Berenson, took into account the expected 7.1% across-the-board per annum increase in the Con Edison worker's salary. This was based

on an historical analysis of Con Edison's collective bargaining agreements over the then past 10 years (see 165a, 166a, 224a). The 7.1% increase was offset by 6%, to account for the future interest earnings on the present award (272a). Professor Berenson first considered an interest rate of 6.2%, which, within the historical framework of interests was "very very high"(172a). In fact, he testified, interest rates at the time of trial were at an all time high (261a), and would not rise faster in the future than would wages, since once it would become too expensive to borrow money, interest rates would go down (262a). The 6.2% was adjusted downward to take into consideration the fact that sums of money must remain available to decedent's widow and children for immediate consumption, and thus cannot be invested in long term financial instruments (272a). The net figures, combining the inflationary wage increase factor of 7.1% and the discount rate of 6% was an increase in earnings of 1.1% per year.

Defendant's own economist in effect agreed with this figure. Defense economist Thomas Fitzgerald testified that the expected 7% per annum increase in Con Edison wages was comprised of two factors: 1) inflation (4%) and 2) productivity increase * (3%) (389a). The witness also testified that the inflation-adjusted

*Real wages or wages adjusted to take out the effects of inflation (350a). With increases in technology, a worker as years pass, becomes more productive with each given hour of work (349a-351a).

(minus the effects of inflation) discount rate should be around 2% (388a). As we urged below, when one combines the 2% discount rate with the 3% productivity increase, one derives an annual increase of approximately 1%, which is virtually the same rate of adjustment used by plaintiff's expert in arriving at his projections.

The Court's determination below that projected wages are to be discounted by 2%, either overlooks or disregards the evidence presented at trial.

-) The Court's determination that on this record Mr. Lavender was a "net consumer of household services" is not supported by the record.

Even if we were to assume arguendo that the trial court's novel "net consumer" approach to the question of loss of services is legally correct, the evidence below does not, we submit, sustain the Court's determination in this regard.

Professor Berenson testified that decedent's total consumption during his life time would be \$191,647 (210a). This, of course, includes consumption of food, clothing, rent, entertainment and other necessities of life. The household services he would render, such as driving his wife about in the family car, painting, carpentry, lifting and other heavy duty

work around the house over a lifetime were valued at \$89,279 (229a).

The conclusion drawn by the court below that the discounted value of that portion of the cooking, cleaning and laundry services which would be rendered by Mrs. Lavender and consumed by Mr. Lavender would exceed \$89,279, is totally unsupported by this record. Absent the conclusory statement of defendants economist that all but the "primary home persons" are net consumers (312a), there is no proof in this record that the services Mr. Lavender rendered his wife were offset in value by the services Mrs. Lavender rendered in return. Indeed, defendant's own expert conceded that the value of certain services which the wife-because of "biological conditions" cannot readily provide herself (e.g. heavy lifting) - and would pay someone else to render, should be considered, since they are of a certain "irreplaceable nature" (312a). In other words, a husband may be physically capable of doing his own cooking and cleaning in the event his wife should die. However, a wife may not have the physical attributes required to lift heavy lumber, bricks or garbage cans or do heavy repair work on her home or automobile and would therefore need to hire someone else to do these tasks for her.

In short, the Court's conclusion Mr. Lavender was a "net consumer" of services is refuted by the record evidence, showing decedent performed a substantial variety of services which Mrs. Lavender must now replace on a lifetime basis.

- d) The Court improperly failed to consider the probability Lavender would be promoted to foreman.

In addition, the court erroneously concludes: "while additional modest in grade increases were clearly expected, it was not urged upon this court that Mr. Lavender, with a tenth grade education, would have become a foreman in later years with the increases attributable to such a grade." [emphasis supplied] We disagree.

Plaintiff's memorandum of law concludes the argument that Lavender may have been promoted to foreman and suggests that an allowance be made for that eventuality. The evidence on this point was that some 50 to 60% of all grade "A" mechanics became foreman, and that a foreman is paid 30% more than is an "A" mechanic. The evidence presented at trial, including proof of the company's policy on promotions, showed that decedent, a good worker, could be expected to advance through grade and qualify for the job of foreman. Defendant did not present proof to the contrary. An allowance ought

therefore to have been made for this probability [see e.g. Davis v. Hill Engineering Inc., 549 F.2d 314, 334-339 (5th Cir. 1977); see also United States Steel Corp. v. Lamp, 436 F.2d 1256, 1270 (6th Cir. 1970), cert. denied 402 U.S.987 (1971)]; see also Geary v. Metropolitan Street R. Co. 73 App. Div. 441 (1st Dept. 1902); Grayson v. Irvman Realty Corp., 7 AD 2d 436 (1st Dept. 1959); Metz v. Great Atlantic And Pacific Tea Co., 30 Misc. 2d 258 (Sup. Ct. 1961)]

- e) The Lavender award is erroneous by comparison with other verdicts.

In Gordon v. Eastern Airlines, 73 Civ. 1694, a jury verdict of \$830,000 was sustained for the death of a man who although earning more than did the decedent here, was several years older than Lavender and did not have the job security available to employees of the Con Edison Company.

In Rosario v. Wheels, tried in the Supreme Court of the State of New York, a verdict of \$733,966 was sustained by the trial court for the death of a decedent 5 years older than ours, who was earning only \$6,000 per year as a clerk in a stationary store, without fringe benefits or job security

In O'Rourke v. General Motors & Lake Central Airlines,

F.Supp. (D.C. Ohio 1969) District Court of Ohio sustained an award of \$586,000 in 1969 for the death of a male 10 years older than Lavender, who was earning \$12,000 per annum at the time of his death [see Marshall Nurenberg, Cleveland, Ohio, for further information regarding this case].

In Scully v. Otis Elevator Co., 275 NE 2d 905 (Ill. App. 1971) \$600,000 was awarded the estate of a 38-year-old plumber earning \$12,900 per year. Although Scully's decedent had 2 children as opposed to our one, considering the difference between that decedent and ours in age and the years of inflation since the decision in that case, it is clear the award in our case is inadequate.

and in 1972, the widow of a 25 year old butcher received an award of \$479,000. Decedent therein was earning \$175 per week [Cutrone v. General Motors Corp. Sup. Ct. New York County - Personal Injury Newsletter, Vol. 16, No. 15, Jan. 29, 1973]

CONCLUSION

The damage awards in the Luger and Lavender cases should

be increased substantially.

Respectfully submitted,

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